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The Effective Regulation of Transnational Securities Fraud in Global Markets*

Kun Young Chang

The increase in cross-border securities transactions produces more opportunities to commit transnational securities fraud. Increasing transnational securities fraud could diminish investor confidence in global markets, resulting in less investment and more impediments to the free flow of capital across borders. In order to regulate the cross-border fraudulent activities effectively, securities regulators need international cooperation. The scope of such cooperation has indeed developed and expanded over time. This Article suggests that securities regulators should continue to negotiate and implement mutual and multinational assistance agreements, and anticipates that the IOSCO could play a critical role in providing international markets with tools necessary for successful regulation of securities fraud.

Keywords: Securities regulation, Transnational securities fraud, Enforcement actions, International cooperation, Cross-border securities transactions, Effective regulation, Mutual and multinational agreements, IOSCO, MOUs, MLATs

1. INTRODUCTION

The globalization of capital markets [1] and the increase in cross-border securities transactions produce more opportunities to commit transnational securities fraud.[2] Increasing transnational securities fraud could diminish investor confidence in global markets, resulting in less investment and more impediments to the free flow of capital across borders. It is essential, therefore, for the regulators of each nation to maintain trust in global markets by regulating cross-border securities fraud effectively.

The U.S. Securities and Exchange Commission (the "SEC" or "Commission"), for example, actively enforces U.S. securities laws[3] against foreign nationals, and U.S. courts have applied domestic antifraud provisions extraterritorially to transactions in other countries.[4] Despite the usual presumption for the territorial application of securities laws,[5]

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[1] The "globalization" or "internationalization," as applied to the capital markets, refers to "an increasing inclination on the part of suppliers and consumers of capital to look beyond their national borders to the markets of foreign nations to locate profitable investments and to raise capital" (Hicks 2001: 1-9).

[2] In the context of this Article, "securities fraud" refers to fraud in connection with the purchase or sale of securities. And a transaction may properly be labeled "transnational" when the transaction touches more than one nation in its conduct, in its effect, or in both (Comment 1973: 1364).

[3] The term "U.S. securities laws" or "U.S. securities regulations," when used in this Article, refers generally to the Securities Act of 1933, the Securities Exchange Act of 1934, the regulations promulgated pursuant thereto, and comparable state securities laws and regulations.

[4] The cornerstones of U.S. securities laws are full disclosure and registration, and the other major components of the laws are antifraud provisions, which play an important role in securities regulations

the United States justifies its actions as necessary to protect U.S. investors and the integrity of U.S. markets (Calhoun 1999; Wood 1995).[6]

Enforcement of one country's laws against securities fraud, however, produces special problems when persons alleged to have violated the laws are foreign or when securities transactions that are allegedly tainted with fraud are foreign in nature. Some of the barriers to effective enforcement grow out of the legal requirements for establishing personal and subject-matter jurisdiction.[7] In addition, securities regulators confront enforcement difficulties in collecting the information needed to investigate and regulate transnational fraudulent transactions. In sum, deciding how to apply securities laws and policy to cross-border activity is a challenge for the regulatory authorities because they have so far been accustomed to regulating domestic conduct and persons exclusively (Hicks 2001: 12-16).

This Article addresses the enforcement challenges to U.S. securities regulator and its achieving effective cooperation with foreign counterparts. The success of U.S. regulator in achieving cooperation for the effective regulation of the cross-border securities fraud is related to the evolution of Korean securities laws, which are similar to the ones of the United States.[8] Despite the fact that legal systems are nationalistic, the particular experience of the United States can be valuable to the development of Korean law and practice.

While enforcement of U.S. securities laws can take place in different forms,[9] the primary focus of this Article is on the SEC's enforcement actions. Part II examines the unilateral enforcement efforts of the SEC and recent international cooperation. Part III suggests that securities regulators continue to pursue bilateral and multinational cooperative agreements in order to effectively detect transnational fraud in global capital markets. Part IV summarizes the preceding discussions.

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by protecting investors from fraud. While the SEC has taken a number of steps to define the scope of disclosure requirements with respect to foreign companies and conduct that occurs primarily abroad, the reach of the antifraud provisions remains a matter for the courts to resolve (Cox et al. 1997: 1201).

[5] The principle of international law calls for such territorial application of securities laws. Cox states that "[t]he territorial principle of international law calls for determining jurisdiction to prescribe and enforce by reference to the place where the act or offense occurs" (Cox 2000: 28).

[6] For more information and problems related to the extraterritoriality of U.S. securities laws, see "Multinational Enforcement of U.S. Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject Matter Jurisdiction" (Chang 2003).

[7] U.S. securities laws can be applied to persons and securities transactions only where the regulator, the arbitrator, or the court has jurisdiction over the person and the subject matter (Hicks 2001: 12-16).

[8] U.S. securities regulations have exerted an important influence upon the securities laws of many other countries. For example, the Korean Securities and Exchange Act is substantially modeled after the federal securities laws of the United States. Also, through international negotiations, the United States has successfully exported portions of its insider trading prohibitions to Japan and Switzerland (Wallace 1985).

[9] Generally, enforcement of U.S. securities laws can take place in at least four different forms: (1) private litigation where defrauded persons seek damages, rescission of contracts, and/or equitable relief; (2) SEC enforcement actions against registered companies or registered market intermediaries, such as broker-dealers, in administrative proceedings or against any person involved in fraudulent activities in judicial proceedings; (3) criminal actions by the U.S. Department of Justice in a U.S. federal court; and (4) self regulatory organizations ("SRO") actions to sanction members for violations of SRO rules which have been approved by the SEC (Hicks 2001: 12-18).

2. ENFORCEMENT ACTIONS IN GLOBAL MARKETS

Regulators enforcing U.S. securities laws in the international arena confront procedural obstacles when collecting evidence regarding possible securities law violations by persons who reside abroad.[10] The SEC has developed two main techniques for gathering information. First, the SEC acts unilaterally, using U.S. domestic evidence-gathering law where possible. Second, the SEC has developed wide array of experiences in requesting cooperation from foreign authorities in evidence-gathering on a bilateral or multilateral basis (Trachtman 1994: 86).

2.1. Unilateral Enforcement Efforts

Due to conflicts between legal systems, the SEC historically has confronted enforcement problems in collecting information needed to prosecute individuals who violate federal securities laws (Cox et al. 1997: 1244). For example, it is very difficult for the SEC to police fraudulent transaction when such transaction takes place through financial institutions outside the United States. These financial institutions are protected by secrecy or blocking laws of their home countries, which significantly limit the ability of the SEC to obtain information needed for prosecution (Kauffman 1985: 811).[11] The SEC can certainly try to obtain information by using diplomatic channels or through voluntary cooperation of foreign countries, but such efforts have generally been unsuccessful.

One practical way for the SEC to obtain information that is being shielded by secrecy and blocking laws is to use the discovery process in litigation. The SEC can initiate an action in federal court when it obtains enough information during the investigation to indicate that a violation of the securities laws has occurred or is occurring. If the recipient of a court subpoena requesting information does not comply, the SEC can request that the court issue an order compelling discovery under Rule 37 of the Federal Rules of Civil Procedure. Also, Rule 37 gives the court the power to impose sanctions against recipients who do not comply with the court order, such as contempt proceedings, monetary fines, the striking of pleadings,

[10] Typically, information concerning ownership and control of entities, as well as accounts location of assets derived from illegal activities and transaction data, is necessary to pursue an investigation and successfully prosecute securities and futures violations. However, there can be obstacles in obtaining such information when it is unavailable because it is located in an uncooperative or under-regulated jurisdiction. In fact, it is because of the potential to thwart investigations that some wrongdoers purposely locate their illegal operations in under-regulated and uncooperative jurisdictions (IOSCO 1994).

[11] Secrecy laws protect the confidentiality of information possessed by financial institutions, and blocking laws prohibit the disclosure or removal of documents from a country (Cox et al. 1997: 1244). Some courts have found ways to remove barriers to SEC enforcement efforts. In *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111 (S.D.N.Y. 1981), the court held that a Swiss corporation, which transacted purchases on U.S. securities exchanges, could be compelled to make discovery and answer interrogatories concerning its undisclosed principals where the corporation had acted in bad faith by making deliberate use of Swiss nondisclosure law to evade the strictures of U.S. securities laws against insider trading.

the prohibition of the introduction of specified evidence, and other adverse measures (Kauffman 1985: 828).

This strategy has been successful to some degree, but it also has disadvantages. First, litigation is an ad hoc approach to resolving discovery, and it results in a lack of uniform results (Kauffman 1985: 831). Second, to obtain a Rule 37 court order and sanctions, the SEC must engage in time-consuming and costly litigation, with no assurance of success (Kauffman 1985: 831-832). Finally, litigation can create significant friction between the United States and other nations because foreign countries might view litigation as an attack on their sovereignty (Collins 1987: 505-506).

Another way for the SEC to request information is to use traditional letters rogatory in accordance with Rule 28(b) of the Federal Rules of Civil Procedure.[12] A letter rogatory is a formal request from a court in one jurisdiction to a court in the jurisdiction in which the information or evidence is located (Greene 1994: 639). Even if a letter rogatory is transmitted to a foreign court after the SEC or other federal agency applies to a U.S. District Court for the issuance of the letter, the result is unpredictable because the foreign court has great discretion in determining whether to grant the request and needs no justification for denying the request (Kauffman 1985: 833). As with Rule 37 court orders, the SEC can petition for a letter rogatory after an enforcement action is pending before a U.S. District Court, and the letters rogatory procedure is also very time-consuming (Kauffman 1985: 833).

2.2. International Cooperation

As the unilateral efforts of the SEC to control transnational fraud through the application of its own laws produce undesirable results and difficulties in enforcement, cooperation among regulators has been an important element in international enforcement of securities laws (Mann and Barry 2002: 201). To promote cooperation in enforcement, regulators have developed multi-faceted strategies for international cooperation, including bilateral

[12] Federal Rules of Civil Procedure Rule 28(b) states: (b) In Foreign Countries. Depositions may be taken in a foreign country (1) pursuant to any applicable treaty or convention, or (2) pursuant to a letter of request (whether or not captioned a letter rogatory), or (3) on notice before a person authorized to administer oaths in the place where the examination is held, either by the law thereof or by the law of the United States, or (4) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony. A commission or a letter of request shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter of request that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter of request may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter of request may be addressed "To the Appropriate Authority in [here name the country]." When a letter of request or any other device is used pursuant to any applicable treaty or convention, it shall be captioned in the form prescribed by that treaty or convention. Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States under these rules.

undertakings and multilateral initiatives with foreign authorities (Mann and Lustgarten 1993: 11).

U.S. securities regulators have participated in international conventions and relied on information-sharing arrangements known as Memoranda of Understanding and Mutual Legal Assistance Treaties. In addition, Congress has passed several acts for international cooperation, and the SEC has been a prominent participant in the International Organization of Securities Commissions, reviewing and developing policies and procedures that affect securities enforcement.

2.2.1. The Hague Convention

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, which was opened for signature on March 18, 1970, entered into force in the United States on October 7, 1972 (23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231, codified at 28 U.S.C. § 1781 (1982) (Supp. 1983)).[13] The Convention provides three means for obtaining information and documents of foreign countries. First, signatories can request each other's assistance in obtaining evidence by using letters of request (Hague Convention: art. 1). The country receiving a letter of request may refuse if, under its laws, execution of the request falls outside the functions of the judiciary (Hague Convention: art. 12). Even if the country does not object to disclosing the requested information, the Convention provides that "the person concerned may refuse to give evidence insofar as he has a privilege or duty to refuse to give the evidence ... under the law of the State of execution ..." (Hague Convention: art. 11). Therefore, the Hague Convention allows secrecy and blocking laws to prevent the disclosure of evidence requested by means of the letter of request procedures (Kauffman 1985: 835). Furthermore, many countries have exercised the Convention's Article 23 option, which enables signatories to declare that they will not execute letters of request for the purpose of pretrial discovery of documents "as known in Common Law countries" (Hague Convention: art. 23). Second, the Convention permits diplomatic officers and consular agents located in a foreign nation to take evidence "without compulsion" from nationals of the country which these officials represent (Hague Convention: art. 15). Finally, the Convention provides that a person appointed as a commissioner may take evidence without compulsion within the territory of another country as long as the foreign government of that country has given permission (Hague Convention: art. 17).

2.2.2. Memoranda of Understanding and Mutual Legal Assistance Treaties

Faced with the difficulties of gathering evidence in cross-border securities fraud due to foreign blocking and secrecy laws, the SEC has been moving towards solutions by entering into bilateral agreements that facilitate enforcement of securities regulation (Ruiz 1995: 231; Hicks 2001: 12-41). Given its goal of improving international enforcement efforts, the SEC has developed a formal agreement that is referred to as Memoranda of Understanding ("MOUs") and entered into Mutual Legal Assistance Treaties ("MLATs") (Hicks 2001: 12-41).[14]

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[13] The Hague Convention attempted to facilitate the execution of extraterritorial discovery by devising methods which were "tolerable to the authorities of the State where discovery would be taken," and by utilizing the forum where the action would be tried (Hague Convention: art. 1).

[14] To facilitate these international agreements, Congress has passed the Insider Trading and Securities Fraud Enforcement Act of 1988 ("ITSFEA") and the International Securities Enforcement

Although an MOU may be legally binding in international law context, most MOUs negotiated in the securities arena are non-binding statements of intent between countries exhibiting similar conceptual ideas concerning what constitutes securities violations and what areas should be regulated by securities laws, thus providing for exchanges of information and mutual cooperation on a bilateral basis (Baltic 1992: 191; Pickholz 2004).[15] The SEC may negotiate an MOU with its counterpart in other countries where there is a broad U.S. government interest or where there are significant cross-border businesses (Office of International Affairs 1997: 754).[16] MOUs form the basis of the SEC's ability to take enforcement actions where the evidence of securities violation is located overseas (Mann 2002: 203). MOUs represent the first step in the development of an effective working relationship between the SEC and its counterpart in a foreign country as well as the initial movement towards the enactment of more comprehensive future agreements (Kehoe 1995: 359). The effectiveness of MOUs consists of their usefulness in providing for the development of "(1) a framework for cooperation; (2) greater experience in addressing international securities law issues; (3) improved communications; and (4) improved working relationships [between the SEC and securities regulators of foreign countries]" (Mann 1993: 31). The SEC has entered into MOUs with regulatory authorities from more than 33 countries, including Brazil, Canada, France, Italy, Japan, and the U.K. (Amchen et al. 2002: 1091).

In addition to MOUs, the SEC has sought and used mutual legal assistance treaties to assist in the enforcement of transnational regulations, and the most notable ones are MLATs with foreign criminal authorities (Kehoe 1995: 362). MLATs are bilateral agreements under which two countries agree to assist each other in the investigation of criminal matters (Ruiz 1995: 231). MLATs not only provide for a broad range of assistance in criminal matters such as criminal investigations and proceedings, but also allow governments to go directly to their foreign counterparts to seek their assistance in gathering information on criminal matters (Kehoe 1995: 362). MLATs have been used very successfully to collect evidence abroad and impose effective sanctions (Ruiz 1995: 231). In particular, the MLAT between the United States and Switzerland has provided a useful mechanism for the SEC, working with the U.S. Justice Department, to obtain information located in Switzerland, including detailed banking information (Mann and Barry 2004: 369).[17]

Cooperation Act of 1990 ("ISECA") authorizing the SEC to provide assistance to regulators from other countries. Pub. L. No. 100-704, 102 Stat. 4677 (1988) (codified as amended in scattered sections of 15 U.S.C.); Pub. L. No. 101-550, 104 Stat. 2714 (1990) (codified as amended in scattered sections of 15 U.S.C. (Supp. 1991)).

[15] "MOUs are frequently used to create a loose and adaptable framework in which to share information, ideas, and resources. MOUs are soft law agreements: non-binding as a legal matter but, at least in the view of many regulators, highly effective and far more flexible" (Raustiala 2002: 22).

[16] Since MOUs should be crafted to fit the circumstances of a foreign market and the powers of a foreign authority, the SEC and the foreign authority, in negotiating an MOU, exchange information about their regulatory systems in order to learn about one another's interests, needs, and capabilities (Office of International Affairs 1997: 754).

[17] The Swiss Treaty entered into force on January 23, 1977 (The Treaty on Mutual Assistance in Criminal Matters Between the Swiss Confederation and the United States, May 25, 1973, U.S.-Switz., 27 U.S.T. 2019). This treaty authorizes the U.S. Department of Justice, as the designated Central

2.2.3. The International Securities Enforcement Cooperation Act of 1990

The recent effort by Congress to strengthen international cooperation in the enforcement of U.S. securities laws resulted in the passage of the International Securities Enforcement Cooperation Act of 1990 (the "ISECA") (Pub. L. No. 101-550, 104 Stat. 2714 (1990), codified as amended in scattered sections of 15 U.S.C. (Supp. 1991)).[18] The main purpose of the ISECA is to "facilitate cooperation between the United States and foreign countries in securities law enforcement" (Pub. L. No. 101-550, 104 Stat. 2714 (1990)) and to "enhance the SEC's ability ... to prevent and detect violations of U.S. securities laws that are committed at least in part abroad and whose investigation may require the Commission to obtain substantial foreign-based evidence" (H. R. Rep. No. 240, 101st Cong., 2d Sess. 20-23, (Oct. 25, 1990), reprinted in 1990 U.S.C.C.A.N. 3888, 3889).

Section 202 of the ISECA amended Section 24 of the Securities Exchange Act of 1934 (15 U.S.C. §§ 78a-78mm (1994 & Supp. II 1996)) (the "Exchange Act") to allow for an increase in the flow of information between the SEC and foreign law enforcement officers (Pub. L. No. 101-550, 104 Stat. 2714 (1990)). Section 24(c) of the Exchange Act grants the SEC discretionary authority to provide non-public records[19] and documents in its possession to foreign persons.[20] Previously, non-public information deemed confidential under the Freedom of Information Act (5 U.S.C. § 552 (1988)) (the "FOIA") was not subject to disclosure. By providing assistance to foreign authorities in need of information for securities investigations, which the SEC has in its possession, this provision shows Congress's anticipation that those foreign securities authorities will be more willing to provide reciprocal assistance in the future (Kehoe 1995: 371).

Section 24(d) of the Exchange Act provides a basis under the FOIA for withholding disclosure of certain information received from foreign securities authorities.[21] Because the

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Authority of the United States, to make requests for assistance directly to its counterpart in the Swiss government, the Swiss Department of Justice and Policy (Kehoe 1995: 363).

[18] Congress has enacted other laws to address the prohibition of insider trading, such as the Insider Trading Sanctions Act of 1984 (the "ITSA") and the Insider Trading and Securities Fraud Enforcement Act of 1988 (the "ITSFEA"). Pub. L. No. 98-376, 98 Stat. 1264 (1984) (codified as amended in scattered sections of 15 U.S.C.); Pub. L. No. 100-704, 102 Stat. 4677 (1988) (codified as amended in scattered sections of 15 U.S.C.). Both the ITSA and the ITSFEA strengthened the SEC's enforcement powers.

[19] Exchange Act Section 24(a), 15 U.S.C. § 78x(a) provides that "'records' includes all applications, statements, reports, contracts, correspondence, notices, and other documents filed with or otherwise obtained by the Commission pursuant to this chapter or otherwise."

[20] Exchange Act Section 24(c), 15 U.S.C. § 78x(c) provides: The Commission may, in its discretion and upon a showing that such information is needed, provide all "records" (as defined in subsection (a) of this section) and other information in its possession to such persons, both domestic and foreign, as the Commission by rule deems appropriate if the person receiving such records or information provides such assurances of confidentiality as the Commission deems appropriate.

[21] 15 U.S.C. § 78x(d) provides: Except as provided in subsection (e), the Commission shall not be compelled to disclose records obtained from a foreign securities authority if (1) the foreign securities authority has in good faith determined and represented to the Commission that public disclosure of such records would violate the laws applicable to that foreign securities authority, and (2) the Commission obtains such records pursuant to (A) such procedure as the Commission may authorize

FOIA requires the SEC to "disclose documents acquired from any source, including foreign securities agencies," if the information furnished by foreign countries to the SEC cannot remain confidential under U.S. law, foreign countries are reluctant to disclose the information (Kehoe 1995: 371). Section 24(d) addresses this problem by providing an exemption from the FOIA requirement (Kehoe 1995: 371).

Finally, Section 203 of the ISECA amended Section 15(b) of the Exchange Act to enable the SEC to impose sanctions on securities professionals registered to do business in the United States who have been determined by a foreign securities authority to have (1) made false or misleading statements in registration statements or reports filed with a foreign securities authority; (2) violated foreign statutory or regulatory provisions relating to securities or commodities transactions; or (3) aided, abetted, or caused another person to violate, or failed to supervise a person who has violated foreign securities or commodities law provisions (Wolf 1995: 15-16). This provision promotes the idea of reciprocity between the SEC and foreign countries in regulating securities violations because "[b]y enabling the SEC to sanction U.S. registered brokers and dealers, the U.S. government can be seen to be providing assistance to foreign authorities in punishing violators of its securities laws. . . [and] foreign securities authorities will provide the same assistance to the SEC in the future" (Kehoe 1995: 373). In sum, by adopting the ISECA, Congress has begun to embrace the SEC's cooperative approach to transnational securities fraud (Wolf 1995: 16).

2.2.4. The International Organization of Securities Commission

Securities regulators have joined the International Organization of Securities Commissions (the "IOSCO")[22] to establish principles that form the basis for further cooperation in securities enforcement.[23] While not binding, the resolutions adopted by the IOSCO are explicit with respect to actions that its members should take (Lesser et al. 2001). In 1994, the IOSCO adopted resolutions to promote international cooperation in enforcement matters (Sommer 1996: 27). These resolutions recommitted members to adherence to the cooperation commitments entailed in membership, and the IOSCO called upon each of them to provide a written self-evaluation assessing its ability to provide mutual assistance and cooperation to foreign securities and futures regulators (Sommer 1996: 27). Also, the IOSCO

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for use in connection with the administration or enforcement of the securities laws, or (B) a memorandum of understanding. For purposes of section 552 of Title 5, this subsection shall be considered a statute described in subsection (b)(3)(B) of such section 552.

[22] The IOSCO is a voluntary association of securities commissions from around the world that was formed in 1974. It was initially formed in order to provide a setting in which representatives of member countries could meet to discuss securities regulation matters. By 1983, the organization had become a worldwide organization and was incorporated by an act of the Quebec Parliament as a non-profit corporation under Quebec law (Sommer 1996: 15-16; Wolff 1995: 400). The IOSCO has an international membership, with securities commissions and other organizations from many countries participating as members.

[23] The membership of the IOSCO has expanded to include most of the world's securities regulators from both developed and emerging markets. The IOSCO performs its work through three committees: (1) an Executive Committee, which oversees the operations of the organization; (2) a Technical Committee, which studies issues in developed securities markets; and (3) an Emerging Markets Committee consisting of regulatory authorities from countries with newer or less developed markets (Office of International Affairs 1997: 770).

has stimulated MOUs among securities regulators committing the parties to cooperate in enforcing their respective securities laws (IOSCO 1995 Annual Report: 3).

On November 1997, the IOSCO adopted a "Resolution on Principles for Record Keeping, Collection of Information, Enforcement Powers and Mutual Cooperation to Improve the Enforcement of Securities and Futures Laws (IOSCO 1997)." The Resolution sets forth the principles which are important for record keeping and enforcement, and focuses on the importance of information sharing among IOSCO members (Mann 1999: 342). The Resolution provides:

> [c]ontemporaneous records should be maintained sufficient to reconstruct all securities and futures transactions subject to regulation, including records of all funds and assets transferred into and out of securities and futures accounts. For each account, records should be available which include information identifying the beneficial owner and controller, and, for each transaction, the account holder, the amount purchased or sold, the time of the transaction, the price, and the individual and the bank or broker and brokerage house that handled the transaction (IOSCO 1997).

Since the record keeping prescribed in the Resolution provides a more complete document trail for transactions, it will assist in monitoring and enforcement (Mann 1999: 342). The Resolution also provides that a competent authority in each member's jurisdiction should have the power to require information identifying persons who own or control (1) public companies, and (2) bank accounts and brokerage accounts (IOSCO 1997). Domestic secrecy laws should not prevent or restrict the collection of such information and records by the competent authorities (IOSCO 1997). As to enforcement and international cooperation, the Resolution states:

> each member of IOSCO should strive to ensure that it or another authority in its jurisdiction has the necessary authority to obtain information, including statements and documents that may be relevant to investigating and prosecuting potential violations of laws and regulations relating to securities and futures transactions ... (IOSCO 1997).

According to this provision, although the regulator itself may not have the power to provide assistance in some circumstances, another government authority in the jurisdiction, such as the criminal prosecutor, may have the power to share information with foreign regulators (Mann and Versace 1999: 342). This can be an important alternative for the IOSCO, because its members have different legal structures (Mann and Versace 1999: 342). In addition, the sharing of such information with other IOSCO members is important in the investigation and prosecution of securities violations, and the Resolution provides that members should take appropriate efforts to ensure that such information can be shared directly among members (IOSCO 1997). Moreover, IOSCO members agreed generally to make efforts to remove any other impediments to cooperation as may exist in their domestic legislative and regulatory frameworks. Finally, the IOSCO will continue to monitor and assist members as they attempt to remove any limitations on their ability to cooperate and provide assistance to other IOSCO members (IOSCO 1997).

In 1998, the IOSCO published a report titled "Objectives and Principles of Securities Regulation" (IOSCO 1998). In that report, the IOSCO provides three principles for cooperation in regulation as follows: (1) "The regulator should have authority to share both

public and nonpublic information with domestic and foreign counterparts"; (2) "Regulators should establish information sharing mechanisms that set out when and how they will share both public and nonpublic information with their domestic and foreign counterparts"; and (3) "The regulatory system should allow for assistance to be provided to foreign regulators who need to make inquiries in the discharge of their functions and exercise of their powers" (IOSCO 1998: Part II.9.1).

In 2002, the IOSCO promulgated the IOSCO Multilateral MOU. The IOSCO Multilateral MOU is a product of the recognition among securities regulators of the underlying need for cross-border cooperation, and it provides another powerful tool for international information gathering (Mann and Barry 2004: 386). The IOSCO Multilateral MOU establishes a complex framework for cooperation, which was agreed upon unanimously at IOSCO's 2002 Annual Meeting. As of January 2005, twenty-five regulators have become signatories.[24] The IOSCO Multilateral MOU is broad-based, authorizing regulators to obtain information and evidence from a variety of sources (Mann and Barry 2004: 387). The IOSCO Multilateral MOU also provides that each authority will make all reasonable efforts to provide unsolicited assistance to the other authorities in the form of information that it considers likely to be helpful to the other authorities in securing compliance with the laws and regulation applicable in their jurisdictions (Mann and Barry 2004: 389).

3. CONTINUING COOPERATION FOR THE EFFECTIVE REGULATION OF TRANSNATIONAL FRAUD

Part II shows that the effective enforcement of one's own securities laws is now impossible without the cooperation of foreign regulators, and that the United States is moving in the direction of international resolutions to international problems. In any case, unilateral enforcement efforts of one nation would generate conflicts with other nations (Gerstenzang 1989: 428; Greene 1994: 671). Cooperative efforts would diminish conflicts and better serve each country's objectives (Gerstenzang 1989: 431-432). Cooperation will facilitate the collection of evidence, the prosecution of traders located abroad, and the

[24] The following regulators are signatories to the IOSCO MOU: Alberta - Alberta Securities Commission; Australia - Australian Securities and Investments Commission; British Columbia - British Columbia Securities Commission; France - Commission des operations de bourse; Germany - Bundesanstalt für Finanzdienstleistungsaufsicht; Greece - Capital Market Commission; Hong Kong - Securities and Futures Commission; Hungary - Hungarian Financial Supervisory Authority; India - Securities and Exchange Board of India; Italy - Commissione Nazionale per le Società e la Borsa; Jersey - Jersey Financial Services Commission; Lithuania - Lithuanian Securities Commission; Mexico - Comision Nacional Bancaria Y De Valores; New Zealand - New Zealand Securities Commission; Ontario - Ontario Securities Commission; Poland - Polish Securities and Exchange Commission; Portugal - Comissão do Mercado de Valores Mobiliários; Quebec - Commission des valeurs mobilieres du Quebec; Slovakia - Financial Market Authority; South Africa - Financial Services Board; Spain - Comisión Nacional del Mercado de Valores; Sri Lanka - Securities and Exchange Commission; Turkey - Capital Markets Board; United Kingdom - Financial Services Authority; United States of America - United States Securities and Exchange Commission and Commodity Futures Trading Commission.

imposition of effective sanctions without requiring nations to sacrifice sovereignty (Ruiz 1995: 243.).[25]

Cooperation between the SEC and foreign governments has expanded the reach of federal securities laws by empowering the SEC to use information gathered from abroad to prosecute U.S. securities law violators (Mills et al. 1997: 491). Table 1 shows international requests for assistance made and received by the SEC.[26]

Table 1. Summary of International Requests for Assistance Made and Received by the SEC

Type of Request	Fiscal Year										
	1990	1991	1992	1993	1994	1995	1999	2000	2001	2002	2003
SEC Request to Foreign Government	177	151	200	220	226	238	336	345	364	448	309
Foreign Requests to the SEC	130	211	253	307	384	466	550	519	483	353	344

Figures are approximate.

Source: 2003, 2002, 2001, 2000, 1999 SEC Annual Report; 1995 SEC Annual Report 23; 1993 SEC Annual Report 23, *cited in* Charles R. Mills et al., "International Enforcement: Enforcement Actions in the Global Market," *in* The Securities Enforcement Manual: Tactics and Strategies, at 523 (Richard M. Phillips ed., 1997)

Among the negotiated mechanisms used by the SEC to obtain information, it may be pointed out that MOUs and MLATs have some problematic features associated with international enforcement (Ruiz 1995: 234). A substantial weak point of MOUs is the fact that they are usually non-binding and that adherence to them is completely voluntary on the part of the contracting parties (Kehoe 1995: 359). Also, since the SEC has no express authority to enter into an MOU, and since MOUs are neither self-executing treaties nor agency rules, the legal nature of MOUs is unclear (Jarmer 1999: 2137). In regard to MLATs, they generally have dual criminality provisions, which require that offenses investigated under such treaties must be criminal violations in both the requesting state and the requested state (Kehoe 1995: 363-364). This requirement has been an obstacle in countries where the transaction at issue is not illegal. Requesting assistance pursuant to an MLAT is also time consuming and bureaucratic (Ruiz 1995: 232). Finally, despite the existing MLATs, it is difficult for the SEC to collect the same kind of information abroad as is obtainable in the United States during an investigation of alleged violations (Ruiz 1995: 234).

Nevertheless, it should be noticed that MOUs and MLATs have facilitated and improved international enforcement of the antifraud provisions, and their existence demonstrates the present international desire of regulators to prohibit cross-border securities fraud (Brooslin 1997: 420). MOUs, for instance, became the leading method of international cooperation in

[25] "Sovereignty" can be defined as the supreme political authority of an independent state. Included in this concept is the idea that sovereignty is fundamentally the ability of a country to enforce its own laws (Friedman et al. 2001: 2).

[26] As of 2001, the SEC has entered into over 30 formal information-sharing arrangements with foreign counterparts (2001 SEC Annual Report: 17).

securities regulations after the SEC had been successful in internationalizing its MOU program through the IOSCO (Trachtman 1994: 87-88).[27] Cooperative arrangements modeled after MOUs that were pioneered by the SEC are now used by securities regulators around the world as an important tool for enforcing domestic securities laws (Office of International Affairs 1997: 750).[28] Since the cooperative nature of MOUs and MLATs presents an exemplary framework, securities regulators will have an opportunity to form more effective and cohesive agreements by combining the best components of MOUs and MLATs (Brooslin 1997: 420). Moreover, legislation like the ISECA could continue to enhance the utility of MOUs and MLATs in international enforcement by expanding the scope of assistance provided by the SEC (Ruiz 1995: 231).

In particular, even though securities transactions will continue to be regulated at the national level in the short- and medium-term future, the IOSCO may be able to provide a foundation upon which to build the responses needed for the effective regulation of cross-border securities fraud (Sommer 1996: 29). While the IOSCO does not work on the basis of binding legislation, it provides a meeting place for securities regulators who want to pool their power, intellectual resources, experiences, and information so as to cope with proliferating problems (Sommer 1996: 28-29). In fact, so far, the IOSCO could be regarded as the most influential non-governmental body that is concerned with the issue of international securities regulation (Hicks 2002: 369). Thus, the SEC should continue to foster cooperation through the IOSCO and provide international markets with tools necessary for successful regulation of securities fraud (Jarmer 1999: 2142).[29]

Cooperation is very desirable, but when regulators pursue bilateral and multinational cooperation, there are a few things they should keep in mind. Most of all, what is important in international cooperation is not only the mechanism through which cooperation occurs, but also the authority and willingness to cooperate (Friedman et al. 2001: 9).[30] Securities enforcement in an international environment is not simply an issue of jurisdiction; it is also an issue of discretion and global coordination (Friedman et al. 2001: 1). Moreover, regulators should not rely on voluntary cooperation alone because excessively broad administrative discretion in deciding which requests of foreign authority to honor can lead to the potential abuse of this power (Ruiz 1995: 234). Also, when a foreign regulator has a great interest in

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[27] Although adherence to MOUs is completely voluntary on the part of the contracting parties, countries generally fulfill their commitments under these agreements, as a matter of comity and preservation of amicable relations (Kehoe 1995: 359).

[28] Since MOUs have become a standard means for enforcement cooperation among securities authorities, regulators in emerging market countries have sought to develop MOUs with more established regulatory authorities. Therefore, the SEC is able to obtain information with ease from many jurisdictions so as to pursue its enforcement cases (Office of International Affairs 1997: 756).

[29] The SEC has been actively involved in efforts to encourage "non-cooperative" countries to join the international enforcement community. As a result of these efforts, a number of foreign countries have adopted new laws that enhance their ability to cooperate with SEC requests for assistance (2001 SEC Annual Report: 19).

[30] Felice Friedman states: While the SEC's MOUs are useful, what really makes them effective is the underlying law — ours and our foreign counterparts'. You can sign as many MOUs as you like, and they can be with a single other regulator, or with scads of other regulators, if those who sign the MOU do not have the legal authority — and the willingness — to cooperate and share information, the MOU is not worth the paper it is written on (Friedman et al. 2001: 9).

enforcement of laws against securities violations and does not want its investigation compromised by SEC actions, the SEC should defer to the foreign regulator despite the enforcement interests of the SEC (Mann and Barry 2002: 290). By doing this, the SEC may be able to continue to enjoy leadership roles in the regulation of international markets and succeed in nurturing international cooperation by means of its enforcement program (Mills et al. 1997: 521).

In sum, the dynamic nature of global markets requires securities regulators to develop new and creative measures to regulate transnational securities fraud. Since no single jurisdiction may have sufficient information to enforce its own securities laws, sharing information and cooperation in investigations among regulators are needed to improve the detection and prevention of transnational fraud in capital markets (Friedman 2002: 193). Thus, the best way to achieve the goal of effective regulation of transnational securities fraud would be to continue to negotiate and implement mutual and multinational assistance agreements (Erwin 1992: 499-500). Especially, by developing an international consensus on the issue of effective regulation of securities fraud, an international organization such as the IOSCO could play a critical role in providing international markets with tools necessary for successful regulation of securities fraud. Thus, the SEC, along with other major securities regulators, should continue to work with the IOSCO to provide a powerful tool for international information gathering. Since the United States has achieved worldwide leadership in the field of securities regulations, other countries would no doubt follow the path of the United States, and such action would lower some of the barriers to effective regulations of securities fraud.

4. CONCLUSION

As securities transactions are internationalized, the incidence of transnational fraud in the trade of securities continues to increase, and the regulators of each nation try to regulate such transnational securities fraud. In order to regulate these cross-border fraudulent activities effectively, securities regulators need international cooperation.

The scope of such cooperation has indeed developed and expanded over time, from requests pursuant to letters rogatory and under the Hague Convention, to the implementation of MLATs among governments and less formal bilateral and multilateral MOUs among securities regulators. With each new development securities regulators have enhanced their ability to investigate and prosecute activities that cross into another regulator's jurisdiction (Mann and Barry 2004: 365). This Article suggested that securities regulators should continue to negotiate and implement mutual and multinational assistance agreements, and anticipated that the IOSCO could play a critical role in providing international markets with tools necessary for successful regulation of securities fraud.

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Kun Young Chang. Member of the New York Bar, Lecturer in law, Hanyang University College of Law, Hanyang University, 17 Haengdang-dong, Seongdong-gu, Seoul, 133-791, Korea. Tel: 02-2220-1830. E-mail: kchang@hanyang.ac.kr